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California Supreme Court Concludes Calculation of Meal and Rest Period Premiums Based on ‘Regular Rate’

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Under California law, nonexempt employees are entitled to certain meal and rest periods during the workday. Pursuant to California Labor Code Section 226.7, an employer who fails to provide meal or rest periods must provide the employee “premium pay,” in the form of an additional hour of pay, at the employee’s “regular rate of compensation” for each workday that a meal period or rest period is not provided.

Until recently, many employers and lower courts have interpreted the “regular rate of compensation” for premium pay to be just the employee’s base hourly wage, and have paid meal and rest break premiums accordingly. This is in contrast to how overtime pay is calculated, which must be at the “regular rate of pay” and includes not only the employee’s base hourly wage but also any nondiscretionary bonuses or other incentive payments. (See the California Labor Commissioner’s Office website for more guidance on how to calculate the regular rate of pay.)

Court shifts calculation

However, a recent decision from the California Supreme Court has concluded that, for purposes of paying meal and rest period premiums, employers must use the same “regular rate” calculation used for overtime, and thus must factor in nondiscretionary bonuses, incentives and other payments that go beyond the base hourly wage.

In the case of *Ferra v. Loews Hollywood Hotel, LLC*, a hotel employee challenged her employer’s failure to include her quarterly nondiscretionary incentive payments when calculating her regular rate of compensation in order to pay any meal or rest period premiums required under California Labor Code Section 226.7. For comparison, the California Supreme Court looked at the overtime provisions of Labor Code Section 510(a). The relevant provision states that employees who are eligible for overtime must be paid at no less than one-and-a-half times their “regular rate of pay.” The court found it was well established, in the overtime context, that “regular rate of pay” includes sources of pay that go beyond just an employee’s hourly wage.

Returning to Section 226.7, the California Supreme Court determined that the California Legislature intended the term “regular rate of compensation” to be synonymous to Section 510’s “regular rate of pay” in terms of its scope and meaning. Thus, the California Supreme Court held that Section 226.7 requires employers to factor in a wider range of payment sources when determining an employee’s regular rate of compensation for meal or rest period premiums, similar to how overtime pay is calculated. Despite the fact that this is contrary to how many employers have historically interpreted Section 226.7 and that this has long been an unsettled issue, the California Supreme Court made clear that the decision in *Ferra* is intended to operate prospectively and retroactively.

Recommendations for employers

Going forward, employers who need to provide meal or rest period premiums to employees under California Labor Code Section 226.7 should make sure that they apply the same “regular rate” calculation they would apply if paying overtime. As stated above, this might include certain incentive payments and bonuses.

Employers can refer to the California Labor Commissioner’s Office website for more information on how to calculate the “regular rate of pay” for the purposes of overtime and meal and rest period premium calculations. Your Cooley attorney can help confirm whether your current calculations are accurate.

Given that the California Supreme Court's ruling operates retroactively, employers should also seek legal counsel with respect to any exposure for past practices. If you have any questions, please reach out to a member of the Cooley employment team.

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